Supreme Court, U.S.
FILED
MAY 7 1997
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(5)

No. 96-1553

In the Supreme Court of the United States

OCTOBER TERM, 1996

ERNST & YOUNG LLP, PETITIONER

v.

P. LARUE SIMPSON, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

We explained in the petition for certiorari that the jurisdictional issue presented in this case is a recurring and important question of federal law that arises in a wide array of contexts (Pet. 10-14); that the federal courts of appeals have reached conflicting results over what legal test governs this issue (Pet. 14-23); and that the Sixth Circuit's analysis is seriously flawed and will create intolerable uncertainty for the hundreds of thousands of accounting, law, medical and other service partnerships that do business in this country (Pet. 24-30). Respondent's submission is largely devoted to arguing that the jury was right to side with him on the *merits* of his claim that Ernst & Young discriminated on the basis of age — a point that is wholly irrelevant to the jurisdictional issue presented here. When respondent does finally get around to explaining why review should be denied, he has nothing persuasive to say. Respondent offers only the most perfunctory attempt to deny the critical importance of the issue presented, and his efforts to explain away the intercircuit conflict and to defend the Sixth Circuit's novel approach are completely unavailing. Further review is plainly warranted.

1. *Respondent's Threshold Arguments*. As an initial matter, respondent makes two arguments why review should be denied: (1) the question presented has already been answered in our favor; and (2) the issue is "strictly factual" or at least largely fact-bound. Br. in Opp. 11-13. Neither argument has merit.

Respondent's first contention (Br. in Opp. 10, 11-12) is based upon a purposeful misreading of the question presented. The issue for this Court's decision is whether a member of "a *bona fide general partnership*" who enjoys all the rights of other partners under the partnership agreement qualifies as an "employee" under the ADEA and ERISA. If the Sixth Circuit had answered *that* question in Ernst & Young's favor, there would have been no need for it to consider whether Simpson possessed "the characteristics of a *bona fide* general partner" (Br. in Opp. 10). It would have been enough that Ernst & Young was a *bona fide* general partnership valid under New York law (as it unquestionably was)

and that Simpson was afforded the same rights under the partnership agreement as every other Ernst & Young partner.[1]

Equally incorrect is respondent's suggestion that the issue presented is purely factual or largely fact-bound. If review is granted, the Court will need to resolve the threshold, purely legal question of what is the proper test for determining whether a nominal partner qualifies as an "employee" under ADEA and ERISA. The choice among competing approaches — the multifactor "common law" test created by the court below (Pet. 8, 24-25); the use of a much more limited list of "key attributes" of *bona fide* partners, as used in other circuits (see *id.* at 15, 19-21, 29-30); the test of whether an individual qualifies as a *bona fide* partner under the applicable state law, as the *amici* law and accounting firms propose (see Brief *Amici Curiae* for Sixteen Law Firms, at 12-20; Brief *Amici Curiae* for Arthur Andersen LLP, *et al.*, at 9-13); or the test that we set forth in the petition — is not dependent upon the facts of this case. It turns instead on an examination of statutory text and structure, legislative intent, background principles of partnership law, and other traditional legal materials.

Of course, once the Court resolves this threshold issue of statutory interpretation, it will face the question of how to apply the correct legal test to the facts of this case. But even if the Court were to perform that task itself, rather than remand to the court of appeals (as in *Darden*), it would not be required to resolve any factual disputes. As respondent elsewhere acknowledges (Br. in Opp. 2 n.3), the parties in this case "stipulated that no conflict of material fact existed" concerning Simpson's status as an

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[1] As we explained in the petition (at 25 n.18), the fact that Ernst & Young's partners delegated certain management responsibilities to *offices and governing committees* created under the partnership agreement does not detract from the conclusion that Simpson enjoyed all of the rights of other Ernst & Young partners under the agreement. There was nothing in the Ernst & Young partnership agreement, for example, that precluded Simpson from serving on the Advisory Council, the Management Committee, or even as chairperson of the firm. Nor is this a case involving different classes of partners (such as "equity" and "non-equity" partners).

"employee" or "partner," and the lower courts accordingly resolved the issue as a matter of law. Pet. App. 2a-3a.[2]

2. *The Vital Importance and Recurring Nature of the Issue Presented.* As we previously explained (Pet. 10-14), because the legal concept of "employee" is a pervasive one, the issue presented here arises with great regularity and affects the reach of an enormous number of important federal and state laws. Although respondent makes a half-hearted attempt to dispute this point, his arguments are completely unpersuasive. Thus, respondent makes the frivolous assertion that this case is not certworthy because it involves no issue of *constitutional* law. Br. in Opp. 27. Next, he maintains that the issue is "of no major precedential value because it was based upon a unique set of facts involving an illusory partnership." *Id.* at 28. Putting aside respondent's astonishing assertion that a firm that has operated in the partnership form (through its predecessor firms) for 90 years is "illusory," this argument is wrong because it focuses exclusively on the part of the decision below that applies the court's novel test to respondent and ignores the fact that the court first articulated a generally applicable legal rule for resolving the partner/employee issue. The Sixth Circuit's misguided test obviously has full precedential effect in future cases.

Finally, respondent suggests that this issue is no longer important *to Ernst & Young* because the firm now operates as a limited liability partnership (LLP). Br. in Opp. 28-29. Apart from the obvious fact that approximately $4 million is at stake in *this* litigation, the argument is wrong for at least two reasons. To begin with, Ernst & Young's conversion to an LLP hardly detracts from the importance of the issue to the hundreds of thousands of general partnerships in the services industry doing business in this country (or the millions of general partners who make up those partnerships). But more important, the argument significantly

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[2] Respondent makes much of the existence of two Ernst & Young partnership agreements. See Br. in Opp. 3-4. As we explained in the petition (at 3 n.1), however, that fact is irrelevant to the legal issue presented here. The two partnership agreements were created solely to comply with state accountancy laws; Simpson was a signatory to both agreements.

misstates the relevance of the change. The only difference between the two kinds of partnerships is that an LLP may — *consistent with state partnership law* — limit the liability of individual partners for the torts of other partners. It has nothing to do with their status as partners *vis-a-vis* one another.

3. *The Conflict and Confusion in the Courts of Appeals*. As explained in the petition (at 14-23), the courts of appeals have addressed the issue presented here in three different ways: (1) the Second and Eleventh Circuits treat as dispositive the organizational choice of co-venturers (whether partners or shareholders in a professional corporation); (2) the Seventh and Tenth Circuits accord substantial deference to organizational choice while examining, at most, a few key attributes of partnership status; and (3) the Eighth and Ninth Circuits focus on several attributes while affording no deference to the choice of organizational form. The Sixth Circuit has now joined the third group with a vengeance, ruling that courts must examine a lengthy list of factors supposedly derived from the common law and the UPA.

Although respondent labors mightily to explain away this deep and abiding conflict, his efforts are unavailing. Respondent concedes, as he must, that the Second Circuit in *Hyland* categorically "refused to conduct any analysis that would * * * reclassify[] shareholder-members of a professional corporation as partners." Br. in Opp. 22; see *Hyland*, 794 F.2d at 797-98 (holding that "the use of the corporate form precludes *any examination* designed to determine whether the entity is in fact a partnership") (emphasis added). According to respondent, however, *Hyland* (1) is distinguishable because it involved a professional corporation rather than a general partnership (Br. in Opp. 22 & n.4); and (2) was overruled by the Second Circuit's failure, in a later case, to grant leave to take an interlocutory appeal (*id.* at 20, 22). The first argument is wrong for the reasons stated in the petition (at 13); is contradicted by other portions of respondent's brief, where he relies on professional corporation cases such as *Devine* and *Fountain* and asserts that such cases "considered the identical issue raised in this petition" and "reached the same legal conclusion" as the court below (Br. in Opp. 16); is at odds with respondent's consistent reliance throughout this litigation on the professional corporation cases; and is incompatible

with virtually all of the relevant case law, which draws no distinction between general partnerships and professional corporations in setting forth the test for determining whether an individual is a *de facto* partner.

The second argument is silly: denial of leave to file an interlocutory appeal hardly represents a determination on the merits. In addition, even if it did, respondent has pointedly failed to mention the Second Circuit's later decision in *Johnson & Higgins*, which expressly reaffirmed the holding of *Hyland* and rejected as "without merit" the argument that it should ignore the organization's choice of form and instead evaluate whether particular individuals were *de facto* partners because of their actual role in the company in light of "common law" principles. 91 F.3d at 1538. The Second Circuit's cases are thus directly contrary to the Sixth Circuit's holding in this case. See also notes 5-6, *infra*.[3]

Respondent fares no better is seeking to explain away the Eleventh Circuit's contrary decision in *Hishon*. Respondent's assertion that this Court disagreed with the Eleventh Circuit's opinion in its entirety (Br. in Opp. 21) is plainly wrong for the reasons stated in the petition (at 17-18). Indeed, the Eleventh Circuit in *Fountain* acknowledged *Hishon*'s continuing validity in Title VII cases (see 925 F.2d at 1400). Although the Eleventh Circuit's adoption of a different approach in ADEA cases is puzzling and in our view erroneous, the court of appeals cannot be said to have overruled *Hishon*.

Equally unconvincing is respondent's attempt to explain away decisions of the Seventh and Tenth Circuits adopting an intermediate approach under which courts accord substantial deference to partners' choice of organizational form while examining a few key attributes of partnership status to ensure that

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[3] Respondent also hints that the definition of "employee" under the federal employment laws should turn on whether consideration of an individual's actual role "would restrict the application of the ADEA." Br. in Opp. 22. In other words, one definition would apply if it helps plaintiffs and another if it helps defendants. This unprecedented approach to statutory construction is "offensive to the principles of equality" (Br. in Opp. 27) respondent touts.

a partnership is not a sham. See Pet. 15, 19-21. Thus, respondent argues (Br. in Opp. 23) that the Seventh Circuit in *Burke* "never assessed any factors" concerning *bona fide* partner status, even though the court expressly noted, in ruling on the jurisdictional issue, that the partners involved "manage[d] and control[led] the business and share[d] in the profits and losses." *Burke*, 556 F.2d at 869. Respondent's related suggestion (Br. in Opp. 23) that the *Burke* court "was not presented * * * with the factual issue of whether a given individual with the title of partner" was indeed a *bona fide* partner — the same basis on which the Sixth Circuit sought to distinguish *Burke* — was anticipated and refuted in the petition (at 21 n.13) and has been rejected by courts and commentators alike.[4]

Moreover, as we explained in the petition (at 19-21 & n.12), the Tenth Circuit's decision in *Main Hurdman* is fundamentally at odds with the Sixth Circuit's decision in this case. Although respondent relies heavily on a snippet from the opinion in which the Tenth Circuit, in obvious dictum, referred to "circumstances not fairly covered by our holding" (825 F.2d at 277 (quoted in Br. in Opp. 18-19)), he makes no effort to explain how the result in *Main Hurdman* can possibly be reconciled with the result in this case. As we explained in the petition (at 21 n.12), the accounting partner in *Main Hurdman* was "functionally indistinguishable from Simpson." Respondent does not, and cannot, dispute this point.

In addition, respondent offers no persuasive rejoinder to our observation (Pet. 22-23 & n.15) that the Sixth Circuit's decision compounds the confusion by delineating a vastly expanded list of purported "common-law factors," which differ substantially from the factors used by other circuits. Respondent says only that the Sixth Circuit's factors are well-founded and they occasionally overlap with the factors used in other circuits. Br. in Opp. 23-24. Respondent's answer does not detract from our point.

Most remarkable of all, respondent categorically asserts that the Sixth Circuit's analysis is "entirely consistent with that of

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[4] See, *e.g.*, *Wheeler* v. *Main Hurdman*, 825 F.2d at 272 n.30; Zelman, *Civil Rights: Law Partners As Employees For Title VII Purposes?*, 35 U. FLA. L. REV. 201, 204 (1983).

every other circuit" and characterizes our discussion of the relevant case law as an attempt to "conjure up" the "appearance of a conflict." Br. in Opp. 11, 21. Suffice it to say that the intercircuit conflict has been recognized by at least 15 federal circuit judges,[5] 8 federal district and state appellate court judges,[6]

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[5] See, *e.g.*, *Devine*, 100 F.3d at 80 (Beam & Murphy, JJ.) (acknowledging that "courts have taken two approaches" to this issue and expressly declining to follow the Second Circuit's approach in *Hyland* and *Johnson & Higgins*); *id.* at 82 (Heaney, J., dissenting) (stating that he agrees with the rule of the Second Circuit in *Hyland*); *Johnson & Higgins*, 91 F.3d at 1537-38 (Cabranes & Miner, JJ.) (citing decisions of other circuits with "but see" signal); *Strother* v. *Southern California Permanente Medical Group*, 79 F.3d 859, 867 n.9 (9th Cir. 1996) (Bright, Skopil & Wiggins, JJ.) (citing *Hyland* with "cf." signal); *Fountain*, 925 F.2d at 1400, 1401 (Fay, Cox, & Markey, JJ.) (expressly "reject[ing]" the Second Circuit's approach in *Hyland); Main Hurdman*, 825 F.2d at 264 (Barrett, Logan & Anderson, JJ.) (noting that Second Circuit has "taken an opposite view" on issue from that of another circuit); *Hyland*, 794 F.2d at 797-98 (Pratt & Miner, JJ.) (expressly disagreeing with Seventh Circuit's view that court should examine a few essential factors in assessing whether an individual is a *de facto* partner).

[6] See *Godeau* v. *Dental Health Services, Inc.*, 901 F. Supp. 1139, 1142-43 & n.7 (M.D. La. 1995); *Johnson* v. *Cooper, Deans & Cargill, P.A.*, 884 F. Supp. 43, 45 (D.N.H. 1994); *Wright* v. *Kosciusko Medical Clinic*, 791 F. Supp. 1327, 1329 (N.D. Ind. 1992); *Gorman* v. *North Pittsburgh Oral Surgery Associates, Ltd.*, 664 F. Supp. 212, 213-214 (W.D. Pa. 1987); *Jones* v. *Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F. Supp. 597, 601 (W.D. Pa. 1987), aff'd without op., 897 F.2d 522 (3d Cir.), cert. denied, 498 U.S. 811 (1990); *Fleming* v. *Lentz, Evans & King, P.C.*, 873 P.2d 38, 41 (Colo. Ct. App. 1994).

and numerous commentators.[7] If the conflict that we contend exists is an illusion, it is one that is widely shared.

4. *The Error in the Court of Appeal's Analysis.* On the merits, respondent offers three arguments in defense of the opinion below. First, respondent maintains that this Court's decision in *Darden* mandates the application of a multifactor common-law test for deciding whether a member of a general partnership qualifies as an "employee." Br. in Opp. 24-25, 27. That argument was anticipated and refuted in the petition (at 28-29). What respondent fails to appreciate is that, in distinguishing "employees" from "independent contractors," there is no practical alternative to looking at the facts of each employment relationship; in the partnership context, by contrast, it is a simple matter to see whether a person has the same rights as all of the other partners in a *bona fide* partnership.

Second, respondent takes issue with the argument that the parties to a partnership agreement "can reach any agreement they wish" and that "the Uniform Partnership Act contains nothing but default provisions." Br. in Opp. 26. But we never made such a sweeping claim. Instead, we said that the UPA's default provisions are "largely subject to alteration by the partnership agreement" and could be altered by the parties subject to "certain limited exceptions." Pet. 26. Notably, respondent does not dispute that many of the UPA provisions enumerated by the Sixth Circuit as essential attributes of partner status can be freely altered

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[7] See Pet. 14-15 (citing and quoting articles by four commentators). See also Ferguson, *Partners As Employees Under The Federal Employment Discrimination Statutes: Are The Roles Of Partner And Employee Mutually Exclusive?*, 42 MIAMI L. REV. 699, 710-21 (1988); *id.* at 700-01 (explaining that "courts have struggled with the issue" and "[c]onsiderable uncertainty remains"); Narducci, *The Application Of Antidiscrimination Statutes To Shareholders Of Professional Corporations*, 55 FORDHAM L. REV. 839, 848-49 (1987) (acknowledging conflict); Phillips, Wheeler v. Main Hurdman*: Partners Are Not Protected Under Title VII Or The ADEA*, 25 HOUS. L. REV. 1179, 1188-1202 (1988) (same); Zelman, *supra*, 35 U. FLA. L. REV. at 202-07 (1983) (same); Freedman, *Discharging Law Firm Partners*, 7 LEGAL ECON. 37, 39 (1989) (acknowledging divergence in approaches taken by federal courts).

by the parties to a partnership agreement. If not a confession of error, that concession at minimum speaks volumes about the need for further review of the decision below. See also Ferguson, *supra*, 42 MIAMI L. REV. at 704 (explaining that UPA "fails to provide definitive guidance for determining whether partners should be considered employees" because "partners may override the UPA's provisions by entering into a written agreement"); Pokora, *Partners As Employees Under Title VII: The Saga Continues*, 22 OHIO N.U.L. REV. 249, 271 (1995) (same).

Third, although respondent does not say so explicitly, his extensive discussion of the *merits* of his age discrimination claim is reminiscent of a theme he sounded repeatedly in the courts below: Simpson may sue as an "employee" because he was susceptible to, and suffered, the very sort of conduct that the ADEA is meant to forbid. Unfortunately for respondent, this argument conflates the jurisdictional issue presented here with the merits; and it is completely circular, because if Simpson is properly excluded from ADEA's coverage, then there is no *federal* law prohibition on any conduct by Ernst & Young that was based on Simpson's age (and any legal recourse Simpson might have would be exclusively under *state* law, see Pet. 24 n.17).

In any event, "susceptibility" is hardly a plausible basis for deciding whether an individual is an "employee" under the federal employment discrimination laws. Obviously, workers in firms that have fewer than 15 employees are *susceptible* to adverse employment actions on the basis of impermissible considerations, yet they are not covered by Title VII or ADEA. Pet. 12. The same can be said for independent contractors. See *Main Hurdman*, 825 F.2d at 275. Indeed, even the most powerful partner in a large nationwide partnership like Ernst & Young (such as a member of the Management Committee) is surely "susceptible" to adverse actions taken by other partners. In short, susceptibility to discrimination is "not a test of employee status at all, but rather is a waiver of the requirement that the worker be an employee for coverage under Title VII." Phillips, *supra*, 25 HOUS. L. REV. at 1190; *Main Hurdman*, 825 F.2d at 275 (rejecting argument that "discrimination itself defines the application of the Acts" on ground that it would "transform the employment discrimination statutes into business discrimination statutes").

As the *amicus* briefs filed in support of the petition explain, the Sixth Circuit's decision threatens devastating consequences for the many law, accounting, and other professional services firms that have chosen for decades to do business in the partnership form.[8] These firms should not be confronted with the possibility of a massive restructuring of their operations in order to avoid liabilities under ERISA and a host of other statutes without a definitive ruling of this Court.

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[8] The accounting firm *amici* urging this Court to grant review include, in addition to Arthur Andersen LLP, the following: Coopers & Lybrand L.L.P., Deloitte & Touche LLP, KPMG Peat Marwick LLP, and Price Waterhouse LLP. The law firm *amici* asking this Court to review the Sixth Circuit's decision include Arnold & Porter; Davis Polk & Wardwell; Dickinson, Wright, Moon, Van Dusen & Freeman; Fried, Frank, Harris, Shriver & Jacobson; Fulbright & Jaworski L.L.P.; Jones, Day, Reavis & Pogue; King & Spalding; Latham & Watkins; O'Melveny & Myers, LLP; Paul, Hastings, Janofsky & Walker LLP; Seyfarth, Shaw, Fairweather & Geraldson; Shearman & Sterling; Skadden, Arps, Slate, Meagher & Flom LLP; Vorys, Sater, Seymour and Pease; Weil, Gotshal & Manges LLP; and Wiley, Rein & Fielding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1997